SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974 No. 74-942

FRANK L. RIZZO, et al,
PETITIONERS,
v.
GERALD G. GOODE, et al.,
RESPONDENTS

HONORABLE JAMES H. J. TATE,
FRANK L. RIZZO, et al.,
PETITIONERS,
v.
COUNCIL OF ORGANIZATIONS ON PHILADELPHIA POLICE ACCOUNTABILITY AND RESPONSIBILITY, et al.,
RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 506 F.2d 542 (1974) and appears in the Appendix to the Petition for Certiorari, beginning at page 4a.

The Final Judgment of the United States District Court for the Eastern District of Pennsylvania, dated October 5, 1973, and the Appendix accompanying that judgment has not been reported, appears in the Appendix to the Petition for Certiorari, beginning at page 20a.

The opinion of the United States District Court for the Eastern District of Pennsylvania, filed March 14, 1973, is reported at 357 F. Supp. 1289 (1973) and appears in the Appendix beginning at page 65a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on November 1, 1974. A timely petition for rehearing en banc was filed on November 15, 1974 and denied on December 6, 1974. The Petition for Certiorari was filed on January 30, 1975 and granted on March 31, 1975. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Is it an abuse of the injunctive power of the federal district courts for a court to assume control of a major aspect of the operations of a municipal police department, require the issuance of its own intra-departmental procedural directives and maintain a continuing judicial surveillance over the department's operations, particularly in the absence of any finding of any unlawful conduct attributable to petitioners?

Is equitable relief precluded where the legal remedies available are not only adequate but are, in many cases, specifically drawn to protect the very interests which the equitable relief seeks to protect?

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871:

42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen or the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Philadelphia Home Rule Charter, Adopted by the Electors April 17, 1951:

Section 1-102. Executive and Administrative Power.

(1) The executive and administrative power of the City, as it now exists, shall be exclusively vested in and exercised by a Mayor and such other officers, departments, boards and commissions as are designated and authorized in this charter. The Mayor and other executive or administrative officers shall be elected or appointed as provided in this charter.

Section 3-101. Department Heads. Each department shall have as its head an officer who either personally or by deputy or by duly authorized agent or employee of the department, and subject at all times to the provisions of this charter, shall exercise the powers and perform the duties vested in and imposed upon the department.

The following officers shall be the heads of the departments following their respective titles: . . .

Police Commissioner, of the Police Department; . . .

Section 5-200. Functions. The Police Department shall have the power and its duty shall be to perform the following functions:

(a) Law Enforcement. It shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto. The Department shall at all times aid in the administration and enforcement within the City of the statutes of the Commonwealth of Pennsylvania and the ordinances of the City.

(b) Maintenance of the Philadelphia Police. The Department shall train, equip, maintain, supervise and discipline the Philadelphia Police.

(c) Police Signal System. The Department shall operate a police signal system either as a separate system or in conjunction with the fire alarm system of the Fire Department.

STATEMENT OF THE CASE

This case comes to this Honorable Court from a decision of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania. The District Court, by a mandatory injunction, directed the Philadelphia Commissioner of Police to completely revise the Police Department's procedures for the receipt and investigation of civilian complaints against police officers and for disciplining errant police officers.

Two separate cases were filed by different plaintiffs purporting to represent essentially the same class of persons and suing generally the same defendants, i.e., the Mayor and other officials of the City of Philadelphia and its Police Department. These two cases, *Goode, et al.* v. *Rizzo, et al.*, Civil Action No. 70-491 and *Coalition of Organizations On Philadelphia Police Accountability and Responsibility* [*hereinafter COPPAR*], *et al.* v. *Tate, et al.*, Civil Action No. 70-2430, were tried separately to conclusion, but were consolidated by the District Judge for purposes of decision some two years after the *COPPAR* Trial.

GOODE, et al. V. RIZZO, et al.

On February 17, 1970 the *Goode* Plaintiff-respondents [hereinafter plaintiffs] filed their Complaint in this case. Defendant-petitioners [hereinafter defendants] are Frank L. Rizzo, Mayor of the City of Philadelphia, Hillel S. Levinson, Managing Director of the City of Philadelphia, Joseph F. O'Neill, Police Commissioner, and Police Captain William Murphy.[1] The complaint alleged that two

[1] These defendants were substituted by Order of the District Court dated September 11, 1973. The original defendants were former Mayor James H. J. Tate, former Managing Director Fred T. Corleto, former Police Commissioner Frank L. Rizzo, former Deputy Commissioner of Police Robert G. Selfridge, and Captain Murphy.

Philadelphia Police Officers, Anthony DeFazio and John D'Amico, had engaged in the practice of violating the constitutional rights of black citizens of the City of Philadelphia, both on their own accord and in furtherance of an alleged departmental policy to violate the rights of black citizens of the City of Philadelphia [A, 14a]. Plaintiffs also alleged that defendants' procedure for internal review and discipline of police officers was "inadequate". [A, 14a]

By way of relief, plaintiffs sought a mandatory injunction requiring defendants to revise their disciplinary procedures with regard to handling citizen complaints of police misconduct, and plaintiffs also demanded that DeFazio and D'Amico be dismissed from the Police Department. [A, 20a-22a]

Your petitioners moved for dismissal, first under F. R. Civ.P. 12(b)(6) and subsequently pursuant to F.R.Civ.P. 41(b). Your petitioners asserted that Officers DeFazio and D'Amico were indispensible parties whom plaintiffs failed to join; that absent any allegation that the named defendants deprived the plaintiffs of any federally protected right, the named defendants could not be held liable; and that, in any event, the Court had no authority to intrude into the internal administration of the Police Department in the manner sought by plaintiffs.

The District Court denied both Motions to Dismiss, although the Court did ultimately hold that since DeFazio and D'Amico were not parties to this suit, no relief could be directed against them. [A, 125a] 357 F. Supp. at 1318-9.

In essence it was the position of plaintiffs and ultimately of the District Court that there were incidents of police misconduct which called for disciplinary action but where no disciplinary action was taken; and that there were incidents in which the disciplinary action which was

taken was not sufficiently severe. In making its findings of fact, the District Court recounted nine incidents, occuring over a period of three years and nine months (October 3, 1967[2] to June 20, 1970[3]), of alleged misconduct on the part of Officers DeFazio and/or D'Amico. [A, 74a-86a] 357 F. Supp. at 1294-1301. Of these nine incidents, the Court found that on four occasions complaints to the Police Department had been made regarding the officers' conduct. The Court found that the offending officer was disciplined on two occasions;[4] was not disciplined on one occasion[5]; and, on one occasion, the complainant refused to press charges against the offending officer when advised to do so by the police[6].

COPPAR, et al. V. TATE, et al.

The complaint in *COPPAR* v. *Tate* was filed on September 3, 1970, following the most difficult summer for Philadelphians since the City was torn by urban riots in 1964. The tensions of the summer of 1970 culminated in late August when the events directly leading to the *COPPAR* suit occurred.

On August 29, a man walked into a Philadelphia Police Station and shot and killed the desk sergeant, Frank Von Colln. Nearby, on that same evening, another policeman, while sitting in his patrol car, was shot and seriously wounded by a sniper. On August 30, two other policemen were shot and seriously injured when they stopped a suspected stolen car. Adding to the tension

[2] Louis J. Reed incident, [A, 84a-85a] 357 F. Supp. at 1300.

[3] Ballow incident [A, 78a-79a] 357 F. Supp. at 1297.

[4] Louise J. Reed incident, [A, 84a-85a] 357 F. Supp. at 1300. Anti-semitic remarks incident, [A, 85a-86a] 357 F. Supp. at 1300.

[5] Gerald Goode incident, [A, 75a-78a] 357 F. Supp. at 1295-6.

[6] Joseph Reas incident, [A, 83a-84a] 357 F. Supp. at 1299-1300.

produced by these incidents, the Black Panther Party had chosen Philadelphia to be the host City for the "Revolutionary Peoples Constitutional Convention" which was to bring some six thousand advocates of violent and non-violent political revolution into the City. That convention was scheduled to begin on September 4 and continue through September 7.

Members of the Black Panther Party were suspected by the police of being involved in the shootings of the police officers. On August 31, 1970 the police attempted to search various premises used by the Black Panther Party. At one of these premises, the attempt to serve the search warrant was met with gunfire from the persons inside the property. After a brief gunfight with the police, the occupants surrendered, emerged and were stripped searched by the policemen on the scene. None of the occupants were injured.

On September 3, the plaintiff-respondents in *COPPAR* filed the complaint initiating their action together with motions for a preliminary injunction and temporary restraining order. Defendants-petitioners are James H. J. Tate, former Mayor of the City of Philadelphia, Frank L. Rizzo, former Police Commissioner and Fred T. Corleto, former Managing Director. *COPPAR* sought to enjoin defendants from interfering in any way with the then imminent "Revolutionary Peoples Constitutional Convention", even in the event of emergency circumstances, and from holding in custody and prosecuting several of the named plaintiffs. [A, 48a-49a]. *COPPAR* further sought an order appointing a "special master" as "receiver" for the Police Department. [A, 49a-50a].

COPPAR's complaint recounted the August 29 to September 7 events described above; and, in a somewhat repetitive series of averments, COPPAR accused defend-

ant Rizzo of threatening Philadelphia's black community with genocide[7] and averred conclusory generalties accusing the defendants of implementing within the Police Department a policy of intimidation and harrassment towards black persons solely because of their race.

Plaintiffs in this action were COPPAR itself, the Black Panther Party, the Southern Christian Leadership Conference, the Young Lords Party, and twenty-one individuals. On defendants' motion the Black Panther Party and the Young Lords Party were dismissed for failure to comply with discovery orders of the District Court. [A, 125a] 357 F. Supp. at 1319. Of the twenty individual plaintiffs, only one, Mary Rouse presented any testimony. She did not testify as to having personally suffered any harrassment or intimidation at the hands of the Police Department or that any such activity was ever directed against her. Of the group plaintiffs, COPPAR testified in the person of Mary Rouse and Floyd Platten, co-chair persons of that organization. [A, 86a-87a] They likewise did not testify that their organization suffered any harassment or intimidation at the hands of the Police Department. Their testimony consisted of second-hand descriptions of incidents of alleged police misconduct which precipitated complaints to COPPAR. The District Court made no findings of fact regarding these incidents.

The District Court refused to enter the temporary restraining order prayed for, but did issue an order enjoining police officers from violating the constitutional

[7] Typical of these allegations is paragraph 22 [A, 41a] where COPPAR avers:

> That the defendant Rizzo was openly, brazenly and illegally threatened the physical extermination and acts of genocide against the Black Community . . . (sic).

In support of this scandalous matter, COPPAR quoted from a statement regarding the murder of Sergeant VonColln made by an obviously distraught and justifiably angry Police Commissioner.

rights of the plaintiff class, thus enjoining the police from performing their job improperly.

The "Revolutionary Peoples Constitutional Convention" came and went without any serious incidents involving the Police Department or any of the defendants. On September 21, 1970 and January 4, 1971, the defendants filed motions for dismissal asserting that since the convention had passed without incident, the bulk of the lawsuit was moot; that COPPAR otherwise failed to state a cause of action since plaintiffs were not entitled to having their prosecutions enjoined and since a federal district court lacked the power to appoint the requested receiver, and that, excluding those averments mooted by the uneventful convention, the remaining averments were so broad and conclusory as to fail to state a cause of action.[8] The District Court did recognize the prejudice to defendants in attempting to defend the case in which the complaint stated no facts. The Court required COPPAR to file with the Court and to serve upon defendants' counsel memoranda of witnesses and incidents. COPPAR filed several of these memoranda which gave the name and address of a witness and the briefest possible description of some sixty-nine incidents. The memoranda were served on October 8, October 20, November 4 and November 20, during the course of the trial.[9] Both the District Court and the Court of Appeals held that these memoranda were sufficient to obviate the necessity to dismiss the Complaint and could properly

[8] The District Court ultimately conceded, on these last grounds, that the Motion to Dismiss was probably meritorious. [A, 125a] 357 F. Supp. at 1319.

[9] Testimony was taken on September 4, 28; November 2, 4, 5; December 1, 2, 3, 4; January 5, 6, 7 and 19. The partial effect of allowing amendment of the complaint through these memoranda was to prejudice the defense of the case since all sixty incidents had to be investigated during the course of the trial.

be considered to be amendments to the Complaint. [A, 125a; App. to Pet. for Cert., p. 8a], 357 F. Supp. at 1319.

The District Court heard evidence of but twenty-eight of the alleged incidents of police misconduct, the incidents occurring over a year's time.[10] The Court determined that in four incidents,[11] there was no police misconduct. With regard to one incident,[12] the Court was satisfied that defendants had remedied whatever problems had existed. The Court specifically criticized the conduct of police officers in two incidents.[13] In the remaining incidents, the Court made its findings without commenting on the propriety of the conduct of either the citizens or police officers involved.

The trial of the Goode case was completed by November 30, 1970 and the trial of the COPPAR case concluded on March 9, 1971. Approximately two years later, on March 15, 1973, the District Court entered an Opinion and Order for both cases consolidating them for purposes of relief. [A, 65a] 357 F. Supp. at 1290. After reviewing the evidence in both cases, the Court concluded that violations of the legal and constitutional rights of citizens are committed by only a small percentage of police officers, but also that such violations do occur too frequently to be dismissed as rare, isolated instances. [A, 123a] 357 F. Supp. at 1318. The Court also concluded that the evidence did not disclose any departmental

[10] Charles Blackman incident, October 12, 1969 [A, 87a] 357 F. Supp. at 1301 to Irene Thompson incident, October 23, 1970. [A, 119a] 357 F. Supp. at 1317.

[11] Charles Blackman incident, [A, 87a-88a] 357 F. Supp. at 1301; Dennis Holland incident, [A, 98a] 357 F. Supp. at 1289; Adalberto Molinas incident, [A, 99a] 357 F. Supp. at 1306; Fred Brooks incident, [A, 107a] 357 F. Supp. at 1310.

[12] Robert Nicholas incident, [A, 88a] 357 F. Supp. at 1301.

[13] Locke and Perry incident, [A, 107a-109a] 357 F. Supp. at 1310; Brown and Smalley incident, [A, 117a-118a] 357 F. Supp. at 1315.

policy to violate the rights of citizens nor any policy of racial bias or discriminatory enforcement on racial lines. [A, 124a, 126a] 357 F. Supp. at 1318, 1319. The Court concluded that the existing police procedures for handling citizen complaints of police misconduct were "inadequate", [A, 124a] 357 F. Supp. at 1318, but also that the plaintiffs had no constitutional right to have those procedures improved. [A, 130a] 357 F. Supp. at 1321. Based on its finding of inadequacy in the department's procedures,[14] the Court ordered defendants to submit revised procedures. Those procedures were to be in accordance with the views of the Court as expressed in its Opinion.

In accordance with the Court's order, defendants prepared and submitted revised procedures, thereby precipitating counter proposals and a series of settlement discussions which continued until September, 1973. Nevertheless the defendants informed the Court and opposing counsel that they reserved the right to object to the grant of any relief. [A, 190a, 194a] On October 5, 1973 the District Court issued its final judgment [App. to Pet. for Cert. p. 20a] which requires, *inter alia,* that the Police Commissioner promulgate, as an intradepartmental directive, procedures for the receipt, investigation and disposition of civilian complaints of police misconduct. The directive was to be in the form of a sample directive which was appended to the Court's order. [App. to Pet. for Cert., p. 24a et seq.]

[14] Insofar as the COPPAR case was concerned, since defendants were not aware that the Court was going to treat the request for relief in Goode as if it were also made in COPPAR, defendants were not on notice in the COPPAR case that they had to defend their internal disciplinary procedures. Plaintiffs' case and the defense in COPPAR contains little evidence relating to those procedures or to departmental investigations of citizen complaints arising out of any of the incidents alleged in COPPAR. Thus in only six of the twenty-eight incidents set forth in its findings did the Court make any reference to citizen complaints.

A timely appeal was taken from the final judgments in both the *Goode* and *COOPAR* cases as well as from the Order of the Court which granted attorneys' fees in each case. On November 1, 1974 the Third Circuit Court, per the Honorable Joseph F. Weiss, Jr., affirmed the District Court as to the injunctive relief but vacated and remanded the award of counsel fees. Notwithstanding the specific findings of the District Court that only a small percentage of Philadelphia policemen violated the legal and constitutional rights of citizens and that there was no departmental policy of racial bias or to deny citizens their legal and constitutional rights, the Circuit Court held that the District Court's remedy was proper because the District Court also found that incidents of police misconduct on the part of that small percentage of police officers could not be dismissed as rare isolated instances, and that the new procedures had the potential for the prevention of future misconduct. Furthermore the Circuit Court agreed with the District Court that plaintiffs were not entitled to revise procedures as a matter of constitutional right, and recognized that the District Court's procedures were simply the Court's idea of a wiser method of police administration. [App. to Pet. for Cert., p. 12a] Defendant-petitioner filed a timely petition for rehearing which was denied by the Court en banc on December 6, 1974. [A, 192a] On January 30, 1975 defendant-petitioner filed his Petition for Certiorari in this Honorable Court. The petition was granted on March 16, 1975.

SUMMARY OF ARGUMENT

I. The judicial power does not exist to pass judgment upon the wisdom, efficiency or adequacy of administrative procedure nor upon the wisdom or competence of executive administration. *Laird* v. *Tatum,* 408 U.S. 1 (1972); *Mourning* v. *Family Publication Service,* 411 U.S. 356 (1973); *Dandridge* v. *Williams,* 397 U.S. 471 (1970). In the absence of any proof or any finding of any unlawful acts on the part of any petitioner and in the absence of any unconstitutionality in the Police Department's procedures for the receipt, investigation and disposition of citizen complaints of police misconduct, the District Court abused and acted beyond its equitable powers in granting relief. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Gilligan* v. *Morgan,* 413 U.S. 1 (1973); *Hague* v. *C.I.O.,* 307 U.S. 496 (1938). The controversy surrounding the "adequacy" of the Police Department's administrative procedures is non-justiciable. *Gilligan* v. *Morgan,* supra; *Flast* v. *Cohen,* 392 U.S. 83 (1968). The directive which the District Court ordered to be promulgated and implemented is counter-productive to the Department's primary mission to prevent and detect crime, is inimicable to the public interest, and improperly and improvidently inhibits the lawful exercise of the discretion vested in petitioners and in individual police officers. *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Wood* v. *Strickland,* — U.S. —, 43 L. Ed. 2d 214 (1975); *Pierson* v. *Ray,* 386 U.S. 547 (1967).

II. The Courts will hold accountable those persons who violate a plaintiff's constitutional rights, but equitable relief does not lie against public officials to prevent unspecified unconstitutional acts to be perpetrated sometime in the future by persons unknown. *Gilligan* v. *Morgan,* supra; *O'Shea* v. *Littleton,* supra. The federal

and state courts, acting pursuant to federal law, state law and the common law, provide an adequate legal remedy for victims of unlawful or unconstitutional conduct. *O'Shea* v. *Littleton,* supra; *Monroe* v. *Pape,* 365 U.S. 167 (1961). The presence of adequate remedies at law preclude the issuance of injunctive relief. *O'Shea* v. *Littleton,* supra; *Younger* v. *Harris,* 401 U.S. 37 (1971).

ARGUMENT

I. IN ASSUMING CONTROL OVER A MAJOR ASPECT OF THE OPERATIONS OF THE PHILADELPHIA POLICE DEPARTMENT, IN REQUIRING THE ISSUANCE OF ITS OWN INTRA-DEPARTMENTAL PROCEDURAL DIRECTIVES AND IN MAINTAINING A CONTINUING JUDICIAL SURVEILLANCE OVER THE OPERATIONS OF THE DEPARTMENT, THE LOWER COURT ABUSED ITS INJUNCTIVE POWER, PARTICULARLY WHERE THERE WAS NO FINDING OF ANY UNLAWFUL CONDUCT ATTRIBUTABLE TO ANY PETITIONER.

In enacting the Civil Rights Act of 1871, 42 U.S.C. § 1983, Congress created a statutory scheme to provide to persons within the jurisdiction of the United States a means of redress for violations, under color of state law, of the rights, privileges or immunities guaranteed by the Constitution and laws of the United States. *Monroe* v. *Pape,* 365 U.S. 167 (1961). "The Act prescribes two prerequisites to recovery: (1) the conduct complained of must have been done by some person acting under color of law; and (2) such conduct must have subjected the complainant to the deprivation of rights, privileges or immunities secured to him by constitution and laws of the United Sates." *Howell* v. *Cataldi,* 464 F.2d 272, 279 (3rd Cir. 1972), quoting *Basista* v. *Weir,* 340 F.2d 74, 79 (3rd Cir. 1965). In affirming the District Court, the Court of Appeals has taken leave of these fundamental precepts.

The two cases before this Court were brought under the Civil Rights Acts, primarily 42 U.S.C. § 1983, claiming that the defendants had effectuated a departmental policy of racial bias and violation of Constitutional rights secured to the people, [A, 14a, 39a, 41a, 43a-47a]; that

certain police officers, not defendants, had violated the constitutional rights of certain plaintiffs and members of the plaintiff class, [A, 14a-18a; see also COPPAR Memoranda of Witnesses and Incidents]; and that the departmental procedures for internal review of incidents of alleged unconstitutional conduct were inadequate, thus indirectly contributing to the specific acts of unlawful conduct alleged to have occurred. [A, 14a].

The District Court found and reiterated its finding that defendants had established *no* policy of racial bias or of violation of constitutional rights, [A, 124a, 126a] 357 F. Supp. at 1318, 1319. The District Court held that no relief could be entered against the police officers whom it presumably would have held liable for their specific acts of unconstitutional conduct since those officers were not before the Court, [A, 125a] 357 F. Supp. at 1318-1319. The Court found that the procedures for internal police review were "inadequate"; but the Court then held, and the Court of Appeals agreed, that those procedures were *not* unlawful; that plaintiffs had *no* constitutional right to improved procedures. [A, 130a; App. to Pet. for Cert., 12a], 357 F. Supp. 1321;

Concisely stated, plaintiffs failed to prove their case: the District Court refused to hold that defendants' conduct "subjected the complainant[s] to the deprivation of rights, privileges or immunities secured to [them] by the constitution and laws of the United States." *Howell* v. *Cataldi, supra; Basista* v. *Weir, supra.* In entering judgment against defendants, not on the basis of constitutional infirmity, but rather on a theory of administrative inefficiency or inadequacy, the District Court erred. In affirming the District Court's departure from the realm of judicial power, the Court of Appeals erred.

The constitutionally ordained function of the federal courts is to adjudicate competing legal rights in the

context of an actual case or controversy. *Muskrat* v. *United States,* 219 U.S. 346, 361 (1911); *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89 (1947). The judicial power does not include the power to inquire into the wisdom, need, desirability or appropriateness of legislative or executive action. *Laird* v. *Tatum,* 408 U.S. 1, 15 (1972); *Mourning* v. *Family Publications Service,* 411 U.S. 356, 358 (1973); *Dandridge* v. *Williams,* 397 U.S. 471, 486-7 (1970); *Daniel* v. *Family Security Life Insurance Company,* 336 U.S. 220, 224 (1949). Moreover it has long been established in American jurisprudence that "to entitle a private individual to invoke the judicial power to determine the validity of executive action, he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of the action . . ." (emphasis ours) *Laird* v. *Tatum,* 408 U.S. at 13 quoting *Ex parte Levitt,* 302 U.S. 633, 634 (1937); see also *O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

In *Laird,* plaintiffs sought, as private parties, to initiate a broad investigation, "armed with the subpoena power of a federal district court and the power of cross-examination", into the intelligence gathering activities of the United States Army. 408 U.S. at 414. The Circuit Court of Appeals for the District of Columbia held that plaintiffs had stated a justiciable controversy. In reversing the Court of Appeals, this Court, per Chief Justice Burger, pointed out:

> "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; . . . [this] is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful government action." 408 U.S. at 15.

Perhaps this doctrine has never been so forcefully stated as by Mr. Justice Frankfurter, dissenting in *Trop* v. *Dulles,* 356 U.S. 86, 120 (1958).

> "Rigorous observance of the difference between limits of power and wise exercise of power—between questions of authority and questions of prudence— requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and to allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic."

The remedy for inefficient, unwise or incompetent administration of the executive branches of government lies not with the federal courts on the complaint of dissatisfied citizens; rather it lies squarely with the electorate.[15] The bedrock of democracy is that the electors give

[15] By virtue of the May 12, 1970 Order of the District Court permitting these cases to proceed as a class action [A, 24a], plaintiffs purport to represent Philadelphia's residents. It would appear however that this legal representation by virtue of F.R.Civ.P. 23 is divorced from reality. In May, 1967, then Mayor Tate, an original defendant in both Goode and COPPAR, was selected in a primary election as the Democratic Party candidate for mayor over the opposition of the Philadelphia County Democratic organization. In November of that year, the voters elected him Mayor.

The present Mayor, Frank L. Rizzo, an original defendant in both cases as Police Commissioner, won the Democratic mayoral primary in May, 1971 and the general election in November, 1971.

On May 20, 1975 the Democratic voters in Philadelphia will pass judgment on the wisdom and competence of the Rizzo administration in the Democratic primary election. Mayor Rizzo is running against the party organization's candidate for mayoral candidacy. Assuming Mayor Rizzo is successful in the primary, Philadelphia's entire electorate will render their opinion on the Rizzo administration in November, 1975.

their authorization to a person to exercise his discretion, be that person elected to executive, legislative or judicial office. As Mr. Chief Justice John Marshall held in the very case which proclaimed the judiciary's fundamental right to review the unconstitutional actions of coordinate branches of government:

> "The conclusion from this reasoning is, that where the heads of departments are political or confidential agents of the executive, merely to execute the will of the President, or rather to *act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.*" [emphasis supplied] *Marbury* v. *Madison,* 1 Cranch 137, 166 (1803).

In the cases presently before this Court, judgment was entered against defendants, not because of their liability for injury to plaintiffs, but rather because aspects of their administration of the Police Department did not meet the Court's concepts of wise administration. In both cases, defendants were charged with having and furthering a departmental policy of racial discrimination and unconstitutional conduct [A, 14a, 39a, 41a, 43a-47a], yet defendants were not found to have committed any unlawful acts. In finding that there was neither a policy of racial bias nor a policy to violate the constitutional rights of citizens the District Court expressly exonerated defendants of the alleged unlawful conduct.

In the absence of any evidence of any legal wrong on the part of defendants, the Court considered evidence of transgressions on the part of individual police officers. The Court found that certain police officers had directly injured certain plaintiffs by violating their constitutional rights. However no officer charged by way of testimony

with specific acts of unlawful conduct nor found by the Court to have acted unconstitutionally was ever made a defendant in either case. Thus the very persons who presumably would have been held liable in a properly pleaded action for specific acts in violation of the constitutional rights of certain plaintiffs and members of the plaintiff class were never brought before the Court. Nevertheless the Court entered judgment against defendants who were guilty only of having employed administrative procedures for handling civilian complaints and for disciplining errant police officers which plaintiffs and the Court deemed to be "inadequate"—not illegal, unlawful or unconstitutional. In its efforts to devise a remedy to cure the "inadequate" procedures, the District Court overlooked the most fundamental prerequisite to equitable relief, the existence of legal liability. *Carter* v. *Chief of Police,* 437 F.2d 413 (3rd Cir., 1971).

The Court's refusal to find legal wrongdoing marks a point of departure from virtually every case in which an injunction against police misconduct has been entered or upheld. In *Allee* v. *Medrano,* 416 U.S. 802 (1974), defendants, the Starr County, Texas Justice of the Peace, Sheriff and several deputy sheriffs and certain Texas Rangers were found to have personally used the power of their offices to thwart efforts to unionize Mexican-American farmworkers. Similarly in *Hague* v. *C.I.O.,* 307 U.S. 496 (1938), Mayor Frank "I am the Law" Hague and certain other municipal officers were found to have deliberately used the power of their offices to exclude and remove labor union organizers from Jersey City, New Jersey. In *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966), the Court held that an injunction should have issued against warrantless searches of residence based on anonymous tips where the searches "were the effectuation

of a plan conceived by high ranking officials [of the Baltimore Police Department]." 364 F.2d at 197. All of these cases enjoined unconstitutional conduct on findings that the defendants had violated the constitutional rights of the plaintiffs; in none of these cases was the governance of the respective police departments arrogated to the Court.

Aside from abusing its injunctive power in granting relief where defendants were found to *not* have violated anyone's constitutional rights, the District Court compounded its error by entering a mandatory injunction which substantially interferes with the rights and the duties of the Police Commissioner and the executive branch of government in the City of Philadelphia. In affirming this error, the Court of Appeals overlooked the relevant decisions of this Court which require reversal.

In *Hague* v. *C.I.O.,* 307 U.S. 496 (1938), this Court was faced with a factual situation far more severe than is present here. In *Hague,* the district court found that the Mayor, Director of Public Safety, Chief of Police and other municipal officers of Jersey City, New Jersey had embarked upon a deliberate policy of brazenly unconstitutional conduct; that the defendants had adopted and enforced the deliberate policy of running union organizers out of town; that the defendants, acting in their official capacity, had adopted and enforced a deliberate policy of preventing, sometimes violently, the distribution of handbills and circulars by representatives of the CIO; and that defendants had adopted and enforced a deliberate policy of preventing representatives of the CIO from holding assemblies or meetings in the open air and in public places. 307 U.S. at 504, 505. In interfering with the meetings and with the distribution of circulars, the defendant City officials acted pursuant to municipal ordinances

which required a permit prior to any public meeting and which prohibited the distribution of circulars. The district court entered a decree enjoining petitioners from removing plaintiffs from Jersey City, from excluding plaintiffs from entry into Jersey City and from interfering with respondents' free access to public places. Further, the district court declared the ordinances void as unconstitutional, enjoined their enforcement and formulated guidelines for the regulation of those activities which the unconstitutional ordinances had sought to control.

In this Court, the district court's decree enjoining the deliberate unconstitutional conduct on the part of the City officials and the declaratory relief and injunction against the ordinances was affirmed. However this Court vacated that portion of the decree setting forth conditions under which the municipal officials could properly act.

> "The decree attempts to formulate the conditions under which respondents and their sympathizers may distribute such literature free of interference. The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *Griffin,* 303 U.S. 444, supra, and petitioners so concede. We think the decree goes too far. All respondents are entitled to is a decree declaring the ordinance void and enjoining the petitioners from enforcing it.
>
> Paragraph 4 [of the decree] has to do with public meetings. Although the Court below held the ordinance void, the decree enjoins the petitioners as to the manner in which they shall administer it. There is an initial command that the petitioner shall not place "any previous restraint" upon the respondents in respect of holding meetings, provided they apply for a permit as required by the ordinance. This is followed by an enumeration of the conditions under which a permit may be granted or denied. We think this is wrong. As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by petitioners. They are free to hold meetings without a permit and without regard to the terms of the void ordinance. *The Courts cannot rewrite the ordinance, as the decree, in effect, does*" [emphasis supplied] 307 U.S. at 518.

Thus though the CIO had pleaded and proven that the municipal officials of Jersey City had deliberately and repeatedly used the power of their offices to deny them their basic constitutional rights to speech, press and assembly, this Court held that they were not entitled to a mandatory injunction designed to prevent future caprice on the part of individual government officials who had convincingly demonstrated their lack of regard for constitutional government. Yet here the District Court did precisely what this Court said in *Hague* the district courts could not do. In choosing to compose and order the issuance of its own procedural directive, the District Court here ignored the very reason for the modification of the *Hague* court's decree.

In *Gilligan* v. *Morgan,* 413 U.S. 1 (1973) this Court again rejected the proposition that the judicial power of mandatory injunction could be used to establish and promulgate standards regulating the exercise of the discretion vested in the executive for administration of the state's police power. Plaintiffs in *Gilligan* sought judicial relief similar in nature to the relief granted by the District Court here; that is, the establishment of standards which would regulate "the training, kind of weapons and scope and kind of orders" controlling the actions of the Ohio National Guard. 413 U.S. at 6. Plaintiffs also sought a

continuing judicial surveillance to assure compliance with the standards to be developed by the Court.[16] In reversing the dismissal of the complaint, the Sixth Circuit Court of Appeals instructed the district court to evaluate plaintiffs' claims, particularly in light of several reports and articles relevant to mob and riot control,[17] and to enter the relief sought if such relief was indicated. On writ of certiorari, this Court reversed and held that the claims presented in the complaint were not justiciable. 413 U.S. at 10. Drawing upon the standards set forth in *Flast* v. *Cohen,* 392 U.S. 83 (1968), Mr. Chief Justice Burger wrote for the Court that there was no justiciable controversy: "(a) 'when the parties are asking for an advisory opinion,' (b) 'when the question sought to be adjudicated has been mooted by subsequent developments,' and (c) 'when there is no standing to maintain the action.'" 413 U.S. at 9-10. These considerations are equally applicable to the instant matter. In ordering the implementation of what it thinks are wiser administrative procedures, in the admitted absence of any unlawful conduct on the part of the defendants and in the admitted absence of any constitutional right to revised procedures in plaintiffs, the opinion and judgment of the District Court can only be described as advisory. Additionally the Court has trampled over the delicate relationship to be preserved between the federal equitable power and

[16] Compare paragraphs 5, 6, and 7 of the final judgment of the District Court wherein the Court implements such a system of judicial surveillance. [App. to Pet. for Cert., 23a]

[17] Here both the District Court and the Circuit Court referred to and relied upon similar outside the record commentary to justify their intrusion into the administration of the Police Department. [A, 123a; App. to Pet. for Cert., 12a]. It is no more likely that from the articles relied upon the Courts below could make a reasoned evaluation of the administrative processes and problems inherent in a major metropolitan police force than it is likely that a district court could make a reasoned judgment regarding the operation of a state national guard from the articles referred to by the Sixth Circuit Court in *Gilligan.*

the state's administration of its own laws and has treaspassed into an area expressly committed to the municipal executive by state statute. Philadelphia Home Rule Charter Sections 1-102; 3-101; 5-200.[18] Additionally the second earmark of a non-justiciable controversy, i.e. mootness, is also present, at least in part, in the instant case. The uneventful passage of the "Revolutionary Peoples Constitutional Convention" mooted the only conceivably controversy in the *COPPAR* case. [A, 61a] Plaintiffs also lack standing to sue for revision of the departmental procedures. It is clear from a reading of the *Goode* complaint that *Laird* v. *Tatum* and the *O'Shea* v. *Littleton* requirements of direct injury resulting from the challenged executive action have not even been alleged, much less proven. As alleged in the complaint, the relationship between the challenged procedures and any injury suffered by any plaintiff or any member of the plaintiff class is indirect and inferential. [A, 14a]

In *O'Shea* v. *Littleton,* supra, this Court again refused to permit the federal courts to use their mandatory injunctive power to supervise the functioning of local government. There plaintiffs alleged that certain county judicial officers had engaged in a pattern and practice of violating the constitutional rights of the plaintiff class. Plaintiffs sought "an injunction aimed at controlling or preventing the occurrence of specific events which might take place in the course of future state criminal trials." 414 U.S. at 500. The district court dismissed the complaint; but the Seventh Circuit Court reversed, ruling that in the event plaintiffs proved their allegations, the district court should "fashion appropriate injunctive relief to prevent petitioners [defendants] from depriving others of their

[18] The Philadelphia Home Rule Charter is a Pennsylvania statute. See *Addison Case,* 182 A.2d 272, 385 Pa. 48 (1961).

constitutional rights in the course of their carrying out their judicial duties in the future." 414 U.S. at 492-3. As is true here, the Seventh Circuit Court disclaimed any intention of requiring the district court to sit in day-to-day supervision of the defendant judicial officers, but suggested that the district court require preiodic reports from defendants on their judicial activities. This Court reversed and held that the complaint was properly dismissed. This Court disapproved of the injunction envisioned by the Circuit Court which would have resulted in "nothing less than an ongoing federal audit of state criminal proceedings," 414 U.S. at 500; it would have run counter to fundamental principles of federalism and unnecessarily and unwisely involved the equitable powers of the federal courts, particularly the power to hold a violator of an injunction order in contempt of court, in the state criminal process. 414 U.S. at 501-2.

As in the case at bar, both *Gilligan* and *O'Shea* involved attempts by class plaintiffs to have the judiciary suspend and supercede the duly ordained powers of state and local government officials, evaluate their performance and frame mandatory injunctive relief in the form of regulations and standards which potentially would have the indirect and derivative result of preventing future unspecified unconstitutional acts to be perpetrated by persons unknown.[19] The ocean of difference between the approach taken by the courts below in comparison to the course set by this Court is apparent from the last para-

[19] Of the three Circuit Courts of Appeal considering this precise question, two have disapproved of this type of relief. *Peek* v. *Mitchell*, 419 F.2d 575, 579 (6th Cir. 1969), "Federal courts should not supervise the maintenance and operation" of police departments and equitable relief is inappropriate absent specific deprivations of constitutional rights by public officials; *Build of Buffalo, Inc.* v. *Sedita*, 411 F.2d 284, 288, 89 (2nd Cir., 1971), a request for relief seeking judicial revision of police disciplinary procedures described as "drastic", "extraordinary" and "far-fetched".

graphs of the opinions for this Court in both *Gilligan* and *O'Shea*. In spurning judicial evaluation of the wisdom and efficacy of executive and administrative procedures and in refusing to countenance federal judicial oversight of state criminal courts, this Court nevertheless pointed out that for their specific unlawful acts, specific persons would most certainly be held accountable in the courts. Indeed this goes to the essence of the judicial power. Conversely, the Courts below, attempting to justify judicial evaluation of the wisdom of executive action, have held that the judicial power, as created by our Constitution and Congress, is now insufficient, and that administrative efficiency and competence are now proper subjects for judicial review.

Although the Court of Appeals agreed that it would be improper for a federal district court to inject itself into the day-to-day operations of the Police Department, the Court held that in this case the District Court had not done so. Although defendants do not agree that the propriety of the District Court's intrusion turns on whether the intrusion is on a day to day basis or not,[20] the plain intent of the Court's directive is to control those day-to-day operations of the Police Department relating to the receipt, investigation and disposition of citizen complaints of police misconduct. Moreover, by promulgating its own directive without regard to such mundane, but nevertheless important administrative considerations as availability and deployment of personnel, the Court's Order seriously effects the entire police function.

The procedures proposed by the District Court govern the investigation of all complaints regarding the conduct

[20] It should be noted that in its judgment the District Court retained jurisdiction and required that defendants maintain statistics in order to effect a continuing regulatory surveillance over the performance of the police department.

of a police officer and the disposition of those complaints which, if taken as true, *do not allege that the officer has committed a crime.* Complaints alleging criminal acts on the part of a police officer are processed in accordance with another set of procedures. [App. to Pet. for Cert., p. 32a]. Except for complaints determined to be frivolous, each complaint must be fully investigated. To be acceptable to the Court, the investigation must include interviews with the complainant and/or victim, the defendant police officer, all other officials involved, all officers witnessing the occurrence, all other witnesses and possible witnesses, and a review and analysis of all physical evidence. [App. to Pet. for Cert. p. 27a]. Wherever possible, the investigator must secure written statements from the participants and witnesses to the alleged incident. [App. to Pet. for Cert., p. 28a]. The investigation must be completed in 45 days. [App. to Pet. for Cert., p. 28a]. In all cases where the investigation produces a factual dispute regarding the occurrence, the Department must convene a quasi-judicial tribunal for the purpose of conducting a public trial of an adversary nature between the complainant and the police officer. [App. to Pet. Cert., p. 33a].

Despite the disclaimers of both the Circuit Court [App. to Pet. for Cert., p. 11a] and the District Court [A., 130a], the procedures established by the District Court will interfere with the police department's primary purpose, to prevent and detect crime. In Philadelphia, a City of 2,000,000 people with the distressingly high crime rate common to virtually all of this nation's large cities, the sheer volume of crime often precludes the type of thorough investigation which the District Court requires, under pain of contempt of court, for matters which are not crimes. The police commissioner, otherwise responsible for the deployment of police personnel, must, under threat

of contempt, assign his investigators in such a manner as to insure that all non-criminal complaints regarding police conduct are thoroughly investigated within the 45 day limits set by the Court. These complaints must be investigated in strict compliance with the Court's order regardless of the number of crimes remaining unsolved, regardless of the number of crimes to be investigated, and regardless of the availability of investigatory personnel.

Even in properly performing his duty, the police officer of necessity constitutes an annoyance to persons breaking the law and to persons whom the officer has probable cause to believe are breaking the law. It is safe to say that virtually every otherwise law abiding person has felt such annoyance on receiving a traffic ticket. Yet complaints arising out of petty annoyance must be investigated and can only be dismissed as frivolous when the investigation demonstrates that the complaint and the evidence can in no way be interpreted as constituting improper conduct. [App. to Pet. for Cert., p. 31a]. In a city of 2,000,000 people, in a metropolitan area 5,000,000 people, the number of complaints of improper conduct on the part of police can be expected to be large. To be sure some will allege grievous misconduct and even criminal conduct on the part of the police officer, but the overwhelming majority will allege non-criminal conduct in the nature of a personal affront to the complainant.

The onerous nature of the judgment can best be seen by analyzing several aspects of the Court's proposed directive in light of the present-day realities of police administration. The judgment requires that complaints be filed in the operations room of each police district, and that the complaint forms be completed with the assistance of the operations room supervisor. [App. to Pet. for Cert. p. 25a]. The operations room is the nerve center for each

police district; it is supervised by a corporal and is typically manned by a turnkey and a police officer. Their duties include, but are not limited to, processing all arrests made in the district, maintenance of all district records and logs, district communication with other police units within the department and with other law enforcement agencies (via teletype and computer), providing for the care, security and transportation of all district prisoners, and providing for the maintenance of vehicles and equipment within the district. Under normal circumstances, the operations room could assume the new duties imposed by the District Court; however, the operations room staff would probably have to be augmented during periods of frequent complaints. Since it can be expected that the number of complaints will be greatest during the period of heaviest and criminal and police activity,[21] the probable result of the decree will be to reduce the police presence on the street during the periods of greatest need in order to increase the operations room staff. Thus the department is faced with a court-imposed and court-enforced misallocation of police personnel.

Based on the circumstances surrounding an incident, a complainant may be filing his complaint in the context of his being arrested and charged with a crime. In such a case, the complainant need do nothing more than lodge a complaint; he may refuse to cooperate in any way with the police investigation of his charge of misconduct until the final disposition of the criminal charges against him, including all appeals. Nevertheless, the police department is required to conduct its investigation of such a complaint despite the complainant's refusal to cooperate, and the charges of misconduct are to remain open until final

[21] e.g., the 4:00 p.m. to 12:00 midnight shift on Friday and Saturday nights in high-crime neighborhoods.

disposition of the criminal case. [App. to Pet. for Cert., 32a-33a). The effect of this aspect of the Court's decree is to impose on the police department the burden to fully investigate allegations of non-criminal conduct on the part of a police officer without even the benefit of a full statement of the claim of misconduct from the complainant.

The District Court requires that the department secure whenever possible, signed, written statements from all participants and witnesses to incidents alleged, [App. to Pet. for Cert., 28a], regardless of the burden to the department in securing such statements in incidents of non-criminal police conduct. It is appropriate to point out that an investigating serious crime such as burglary or robbery, it is the typical practice for detectives to summarize statements of witnesses, the investigatory burden being simply too great to permit the exclusive use of written, signed statements. Again, the result of the Court's decree is a misapplication and misdirection of the personnel and resources of the Police Department.

The Court's proposed directive further provides that the Police Commissioner or one of his two deputy commissioners personally review the entire investigatory file for each and every complaint of police misconduct certified to them by the Chief Inspector of the Internal Affairs Bureau. [App. to Pet. for Cert., p. 33a]. In 1974 the Police Department received approximately 1,200 complaints of police misconduct. Assuming, albeit unrealistically, that the number of complaints will not increase should the District Court's order be implemented, and further assuming that the Commissioner or Deputy Commissioner who assumes the duty of reviewing these files works 365 days per year, he would be required, under pain of contempt of court, to review, in their entirety, an average of 3.28 files per day or 23 files per week. Thus, aside from

suspending the Police Commissioner's authority in entering its order, the District Court's judgment additionally represents an unwarranted and unwise intrusion into his many other duties in administering the department.

In those cases of alleged misconduct in which the investigation produces a factual dispute regarding the incident, the police must convene a quasi-judicial tribunal for the purpose of conducting a public trial of an adversary nature between the complainant and the police officer. [App. to Pet. for Cert., p. 33a]. Aside from duplicating the functions of the federal and/or state courts, the Courts below seriously underestimated the harmful effect on law enforcement which the creation of this superfluous tribunal would have. The tribunal cannot make any award or grant any benefit to a complaining citizen other than grant him the visceral self-satisfaction of knowing that he has harassed a presumably innocent policeman in the public eye. It is this context that the full impact of the difficulties caused by the District Court's decision must be seen; for, except for the most frivolous of circumstances, any person who for any reason has been annoyed or bothered by or bears a grudge against any police officer, the overwhelming majority of whom were found to have been doing their job properly [A, 123a; App. to Pet. for Cert., p. 11a], may without compunction force such a police officer to public trial. The undesirable portent of the procedures created by the District Court is that the police department will be required to investigate and hear complaints of non-criminal police conduct which have as their only motivation the harassment of the overwhelming majority of police officers who are simply doing their job. It will be these types of cases which will plague the department, and the predictable effects on law enforcement are seriously damaging to the public interest, in view of both the direct

harm to the department as set forth above and the possible reluctance of individual police officers to properly enforce the law for fear of being hauled before the tribunal for their attempts to do their jobs.

In *Pierson* v. *Ray*, 386 U.S. 547 (1967), this Court recognized the special problems faced by a police officer who is frequently and intimately involved in day-to-day contact with the citizenry and, hence, most frequently exposed to situations which can give rise to complaints regarding his performance of duty. This Court observed that a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." 386 U.S. at 557. To paraphrase former Chief Justice Warren, the Philadelphia policeman's lot is now so unhappy that he must make the choice of being charged with dereliction of duty if he does not arrest when he has probable cause and being publically harassed if he does.

In the words of Mr. Justice Jackson, quoted with approval in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). "It is not a tort for the government to govern." *Dalehite* v. *United States*, 346 U.S. 15, 57 (1953). (Dissenting opinion). In *Scheuer*, Mr. Chief Justice Burger further stated for the Court:

> "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error

and possible injury from some error than not to decide or act at all." 416 U.S. at 241-242.

Furthermore, this Court held that because of the complexity in the range of decisions which must be made by executive officials, a qualified immunity from liability under 42 U.S.C. § 1983 was available to officers of the executive branch of government in variation dependent upon the scope of discretion and responsibilities of their office and all the other circumstances as they reasonably appear at the time of the action on which liability is sought to be based. 416 U.S. at 247-248. See also *Wood* v. *Strickland*, __ U.S. __, 43 L.Ed. 2d 214 (1975).

In suspending and arrogating to itself the discretionary powers of the local executive, the District Court has ignored the policy reasons for the extension of qualified immunities from civil liability to executive officials in suits brought under Section 1983. As surely as the potentiality of a tort suit will inhibit the exercise of executive discretion, it is far surer that the possibility of being held in contempt of court will inhibit and in fact deprive the Mayor and Police Commissioner from exercising the power and the discretion granted to them by law. They are effectively denied the power and discretion which the electors of Philadelphia decreed that they should have; rather they become puppets of the federal court subject to citation for contempt if they do not respond to every pull of the judicial string. The public policy as stated by this Court in its decisions on official immunity from damages under 42 U.S.C. § 1983 from *Tenney* v. *Brandhove*, 341 U.S. (1951), to *Wood* v. *Stickland*, supra, is completely nullified, if, in the absence of any wrongdoing and in the name of administrative wisdom, the district courts can suspend the power and discretion of local administrators and assume their power unto themselves.

II. THE LEGAL REMEDIES PROVIDED BY THE CIVIL RIGHTS ACTS AND STATE LAW OBVIATE THE NECESSITY FOR EQUITABLE RELIEF.

Where the Court below found that violations of legal and constitutional rights of citizens are committed by only a *small* percentage of the members of the Philadelphia Police force and that the evidence does *not* disclose any policy of racial discrimination or unconstitutional conduct, the imposition of injunctive relief to prevent future, unspecified and sporatic violations of constitutional rights is improper when adequate and specifically drawn legal remedies exist. Furthermore, it is even more unwarranted and onerous for the Court under such factual circumstances to order mandatory injunctive relief which provides for continued judicial surveillance, which usurps and enfeebles the discretion of local law enforcement officials and which encourages the dubious use of ad hoc equitable relief in situations where legal remedies exist by virtue of the Civil Rights Act and state law.

The District Court below, with express agreement of the Third Circuit Court of Appeals, found that existing police procedures for processing and adjudicating complaints and enforcing police discipline were inadequate for the following reasons:

(1) The procedures were geared to handle infractions of police regulations but were not formed to cover specific violations of citizens' constitutional rights;

(2) The chain of command system of departmental operation discouraged civilian complaints;

(3) There was no adequate opportunity for the complainant to present his case to an objective tribunal;

(4) The outcome of the proceedings were not disclosed; and

(5) There was a tendency to minimize the consequences of proven misconduct. [App. to Pet. for Cert., p. 6a].

In a well intended effort, the District Court devolved its plan to rectify the existing flaws mentioned above by a sweeping grant of injunctive relief. The court's solution to the problem was to create a quasi-judicial tribunal within the Police Department to handle civilian complaints of police misconduct. However, either by conscious or inadvertent design, the District Court created a mirror image of itself, a duplication of the existing and specifically created forums whose purpose it is to process and adjudicate violations law—the federal and state courts.

The federal and state courts were designed to prevent and remedy unconstitutional violations of individual rights by official misconduct. They provide:

(1) A vehicle to handle infractions by police of specific violations of citizen's rights;

(2) An easily accessable forum for complaints of unconstitutional conduct;

(3) An objective tribunal;

(4) Proceedings which are public, the outcome of which is public; and

(5) Redress and punishment for unlawful conduct.

There is absolutely no justification for assuming that the state and federal courts are incapable of providing adequate remedial relief for specific unlawful conduct perpetrated by the small minority of policemen. Moreover, in line with this Court's decisions in *Gilligan* and *O'Shea,* specific unlawful conduct by public officials will not go unpunished, and the individuals responsible will be held accountable for their unconstitutional acts. The irony is that in creating a departmental bureaucracy to receive

and adjudicate complaints of specific acts of misconduct on the part of police officers, the District Court attempted to place elsewhere the very duty which this Court has said rests with the courts. *Gilligan* v. *Morgan,* supra, 413 U.S. at 11-12; *O'Shea* v. *Littleton,* supra, 414 U.S. at 503-504.

Furthermore the District Court's finding of inadequacy was measured on a yardstick of the Court's own creation. No one has ever intimated that the police disciplinary procedures were geared to handle anything other than infractions of police regulations or that the police were not a quasi-military organization which operates in accordance with a basic command structure. The police have absolutely no duty to provide a quasi-judicial tribunal to conduct adversary hearings for violations of constitutional rights. Neither the United States Constitution (as is conceded by both the Circuit and the District Courts), nor any Federal statute, nor the Pennsylvania Constitution, nor any Pennsylvania statute, nor the Philadelphia Home Rule Charter, nor any ordinance of the City of Philadelphia purports to impose such a quasi-judicial function on the police department. Thus, in making its finding that the disciplinary procedures were inadequate, the District Court supplied itself with its own ultimate conclusion; the Court did no more than place the proverbial rabbit in the hat. The existing police disciplinary standards were never intended to meet the standards set by the Court; they were never intended to provide a surrogate judiciary; but they are fully adequate for the purpose for which they were designed—to handle infractions of police regulations.

Assuming arguendo that the existing departmental procedures were unlawful rather than merely inadequate, in order to justify its grant of an equitable remedy, the District Court was compelled to determine whether any remedy at law was adequate. *Younger* v. *Harris,* 401 U.S.

37, 43-44 (1971); *O'Shea,* supra, 414 U.S. at 499. In the instant case, the Court below ignored the available legal remedies[22] with the epitaph that they too were "inadequate". Rather than take cognizance of its own findings and conclusions which would have indicated that equitable relief was not warranted, the District Court launched into its grand design of revamping and reorganizing internal police procedures. The Court below, by judicial innovation, decided to fill the gaps that it perceived to exist in the law. More particularly, the Court below stated:

> I am convinced that . . . existing remedies are inadequate to protect the public interest involved. Private suits for damages are expensive, time consuming, not readily available, and not notably successful . . . [A 125a] 357 F. Supp. at 1319.

Such a blandishment ignores the true facts:

(1) Many civil rights suits are handled on a contingent fee basis, and there are many organizations specializing in and actively soliciting civil rights cases, thereby providing legal expertise on a nonpayment basis;[23]

(2) Civil rights suits have been increasing, not decreasing;[24]

(3) The federal courts have liberally interpreted the Civil Rights Act to afford easy judicial access to civil rights claimants. *Haines* v. *Kerner,* 404 U.S. 519 (1972); *Conley* v. *Gibson,* 355 US 41 (1957).

Before resorting to equitable relief, the courts are under a duty to examine the available legal remedies in light of the facts in any given case to determine whether they are adequate to afford substantial redress for the wrong suffered. *Harrisonville* v. *U. S. Dickey Clay Mfg. Co.,* 289 U. S. 334 (1932). Only upon the traditional showing of irreparable injury, may the courts resort to the injunction. *Younger* v. *Harris,* 401 U. S. at 46; *O'Shea,* supra, 404 U. S. at 499. Also, while considering the nature of the injury to the moving party, the Court must also weight the potential harm, injury or hardship that the imposition of an injunction would cause the defendant. *Harrisonville* v. *Dickey,* supra. at 338; *O'Shea* v. *Littleton,* supra at 499, *Younger* v. *Harris,* supra.

The availability and adequacy of money damages to compensate individuals whose constitutional rights have been violated by public officials was discussed in *Monroe* v. *Pape,* 365 U. S. 167 (1961). In that case, this Court analyzed the purposes behind the enactment of the Civil

[22] For example (1) common law torts (false arrest, false imprisonment, malicious prosecution, assault and battery, etc.); (2) criminal offenses covered by the Pennsylvania Criminal Statutes (e.g. assault and battery); (3) State statute forbidding the neglect and abuse of police power in periods of emergency, Act of May 3, 1850, P.L. 666, § 29, 53 P.S. § 16627 which provides as follows:

> "The said Marshall of police, lieutenants of police, and policemen hereby organized, for any neglect of their duties, or abuse of the powers hereby granted, shall, upon complaint duly made to the judges of the Court of Quarter Sessions for the County of Philadelphia, by any citizen or other person aggrieved, be examined as to the justness of said Complaint; and if upon examination said judges, or anyone of them, shall be satisfied that there is sufficient cause to bind over, the said party or parties shall there upon be bound over to take his or their trial for a misdemeanor in office; and upon conviction, shall be punished as misdemeanors are now by law punishable.";

(4) The Civil Rights Act, 42 U.S.C. 1983, which provides legal remedies for violations of constitutional rights; (5) various other federal acts providing civil or criminal redress for violation of constitutional rights.

[23] e.g., the American Civil Liberties Union, Community Legal Services, Public Interest Law Center of Philadelphia.

[24] The 1974 Annual Report of the Director of the Administrative Office of the United States Courts notes that in 1974 there were over 8,000 civil rights suits filed in the U. S. District Court. Such is a remarkable increase over the mere 296 that were filed when the decision in *Monroe* v. *Pape* was reported in 1961. *Polite* v. *Diehl,* et al., ___ F.2d ___, No. 72-2013, 3rd Cir., Dec. 31, 1974, slip opinion. p. 41-2, Kalodner, *J.,* dissenting.

Rights Act of 1871, 42 U.S.C. § 1983. On behalf of the majority of the Court, Mr. Justice Douglas stated that there were three purposes:

(1) To override certain kinds of state law;

(2) to provide a remedy for violation of constitutional rights where state law was inadequate;

(3) to provide a federal remedy where state remedies, though adequate in theory, were not available in practice. 365 U. S. at 173-174.

The main thrust of the Civil Rights Act as explained in *Monroe* v. *Pape* was to afford remedial relief in the form of damages for violations of constitutional rights, however slight. Mr. Justice Douglas reported that during senatorial debates it was mentioned that the proposed civil rights legislation was to afford the right to

> ". . . any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal Courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by such section jurisdiction of that civil rights action is given to the Federal Courts . . ." 365 U.S. at 180-181.

Furthermore, Justices Harlan and Stewart in their concurring opinion viewed the Civil Rights Act as a positive force elevating the importance of Civil Rights violations to a significantly higher level than would have theretofore existed in state law. In their opinion a violation

of a constitutional right by a public official justified a substantial award in damages.[25]

In every single instance of abuse by individual policemen enumerated by the Court below, the legal remedies provided by the Civil Rights Act would have more than adequately compensated the complainants, and were specifically drawn for just that purpose.[26] If the District Court had found that the defendant City officials were responsible for the instances of unconstitutional conduct that occurred, certainly stringent remedies would have been indicated.[27] However, by its intrusion, the District Court has placed itself as the monitor of the conduct of each officer and by doing so has thrust itself into the middle of a hopeless, never ending battle between those in whom we entrust the enforcement of the law and those against whom the law is enforced.

In *O'Shea* v. *Littleton,* supra, 414 U. S. at 503-504, this Court specifically held that the presence of state and federal legal remedies constituted adequate remedies at law which precluded injunctive relief against future, un-

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[25] Even though the Act provides for equitable relief where warranted, resort to damages should be more than adequate except under extraordinary circumstances. This is true when one considers that Justices Harlan and Stewart believed that the Civil Rights Act was more than a jurisdictional provision only and that the enacting legislature had the view that "a deprivation of a constitutional right is significantly different and more serious than a violation of a State right and therefore deserves a different remedy even though these same acts may constitute both a State tort and the deprivation of a constitutional right." 365 U.S. at 196.

[26] This is especially true where the occasions of police brutality and discrimination are not sanctioned or encouraged by higher public officials, and only a few police officers commit the abuses. The fact that a small number of police officers occasionally act unconstitutionally does not justify such an extensive and overwhelming intrusion by a federal court into the day to day operation of the Department.

[27] *Hague* v. *C.I.O.,* 307 U. S. 496 (1938); *Allee* v. *Medrano,* 416 U. S. 802 (1974); *Lankford* v. *Gelston,* 364 F. 2d 197 (4th Cir. 1966).

specified unconstitutional acts on the part of specific judicial officers. Similarly, future, unspecified unlawful acts of *unspecified* police officers can and should be remedied by justice meeted out in the federal and state courts pursuant to statutory and common law. The injunctive power of the federal court should not be exercised except in exceptional cases to prevent injuries that are clear and imminent. *Douglas* v. *City of Jennette,* 319 U. S. 157, 163 (1943); *O'Shea* v. *Littleton,* supra.

The Court below would enjoin unspecified future police misconduct by imposing its will on the Police Commissioner with consequent disruption of the Department's primary functions, notwithstanding the absence of a finding that the defendant officials condoned, approved, participated in or accepted unconstitutional conduct on the part of individual police officers. If it may be reiterated, the nub of this case is that the disciplinary procedures of the Philadelphia Police Department were found to be unwise and inadequate—not unlawful, and they are thus beyond judicial remedy. Considering the availability of other avenues of relief for violation of federal and state rights by police officers and the abrasive, unmanageable and unwise intrusion into police administration which the injunctive relief represents, petitioners respectfully submit that the Circuit Court of Appeals erred in affirming the injunctive relief granted by the District Court.

CONCLUSION

For the foregoing reasons, it is submitted that the Circuit Court of Appeals for the Third Circuit was in error in affirming the injunctive relief granted by the District Court. Petitioners respectfully request that this Honorable Court reverse the decision of the Circuit Court.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, James M. Penny, Jr., Assistant City Solicitor and counsel for Petitioners, do hereby certify that three copies of the Brief for Petitioners and three copies of the Appendix were served by hand on Peter Hearn, Esquire and William Lee Akers, Esquire, Counsel for Respondents on the 21st day of May, 1975. I further certify that all parties required to be served have been served.

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